Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

ELROY CHESTER,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

Question Presented

The Texas Court of Criminal Appeals assessed petitioner's mental retardation using seven factors that rely heavily on the facts of the crime, have no basis in the scientific literature, and conflict with the well-accepted definitions of mental retardation recognized in *Atkins v. Virginia.* Despite petitioner's significantly subaverage intellectual functioning and significantly subaverage adaptive functioning, Texas declared him not mentally retarded and subject to the death penalty.

Does Texas defy *Atkins* and violate the Eighth Amendment by ordering a mentally deficient inmate put to death under a novel test of mental retardation that finds no support in any criteria accepted as rational and reliable measures of retardation?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding below are Elroy Chester and the State of Texas.

No party is a corporation.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceedings and Rule 29.6 Statement ii

Table of Contents iii

Table of Authorities iv

Opinions and Orders Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 1

A. Introduction 1

B. Chester's Trial And Events Preceding The *Atkins* Hearing 2

C. The *Atkins* Hearing 4

D. Decision Of The Texas Court Of Criminal Appeals 13

How The Federal Questions Were Presented 14

Reasons for Granting the Petition 15

I. Texas's Method For Assessing Mental Retardation Permits The Execution of Mentally Retarded Defendants, In Violation of *Atkins* and the Eighth and Fourteenth Amendments 15

A. Nationally Accepted Definitions Of Mental Retardation Reflect The AAMR And DSM-IV-TR Criteria 15

B. Texas Alone Uses A Definition Of Mental Retardation That Disregards Scientific Criteria For Measuring Adaptive Functioning..... 18

C. Using The *Briseño* Factors To Assess Mental Retardation Violates The Eighth Amendment, Because The *Briseño* Factors Do Not Reliably Determine Mental Retardation..... 20

1. Texas improperly excludes individuals with an antisocial personality from its definition of mental retardation..... 20

2. Texas improperly evaluates adaptive functioning through factors with no reliable relationship to mental retardation 22

3. Chester's case offers an excellent vehicle for enforcing *Atkins* in Texas..... 29

Conclusion 30

Appendices (bound separately)

Appendix A: Final Decision of the Texas Court of Criminal Appeals

Appendix B: Decision of the Trial Court

Appendix C: State Definitions of Mental Retardation and Adaptive Functioning

Appendix D: Texas Court of Criminal Appeals Decisions Post-*Atkins*

TABLE OF AUTHORITIES

Cases

Abdul-Kabir v. Quarterman,
127 S. Ct. 1654 (2007) 29, 30

Atkins v. Virginia,
536 U.S. 304 (2002) ..... *passim*

Blonner v. State,
127 P.3d 1135 (Okla. Crim. App. 2006) 16

Brewer v. Quarterman,
127 S. Ct. 1706 (2007) 30

Caldwell v. Mississippi,
472 U.S. 320 (1985) 23

Chester v. Cockrell,
62 F. App'x 556 (5th Cir.) (2003) (not selected for publication in the Federal Reporter) 4

Chester v. State,
No. 73,193 (Tex. Crim. App. unpublished decision delivered Jan. 26, 2000) 3

Commonwealth v. Miller,
888 A.2d 624 (Pa. 2005) 16

Ex Parte Bell,
152 S.W.3d 103 (Tex. Crim. App. 2004) 19

Ex Parte Blue,
___ S.W.3d___, 2007 WL 676194
(Tex. Crim. App. 2007) 18

Ex Parte Briseño,
135 S.W.3d 1 (Tex. Crim. App. 2004) ..... *passim*

Ex Parte Chester,
No. WR-45,249-01 (Tex. Crim. App. unpublished decision delivered May 31, 2000) 3

Ex Parte Chester,
No. WR-45,249-02 (Tex. Crim. App. unpublished decision delivered Sept. 10, 2003) 4

Ex Parte Modden,
147 S.W.3d 293 (Tex. Crim. App. 2004) 19

Ex Parte Stevenson,
No. AP-75,639, 2007 WL 841127
(Tex. Crim. App. unpublished decision
delivered Mar. 21, 2007) 19

Ford v. Wainwright,
477 U.S. 399 (1986) 22

Graham v. Collins,
506 U.S. 461 (1993) 29

Gregg v. Georgia,
428 U.S. 153 (1976) 19

Holladay v. Campbell,
463 F. Supp. 2d 1324 (N.D. Ala. 2006) 21, 27

Howell v. State,
151 S.W.3d 450 (Tenn. 2004) 17

Hughes v. State,
892 So. 2d 203 (Miss. 2004) 16

In re Hawthorne,
105 P.3d 552 (Cal. 2005) 16

Jones v. United States,
527 U.S. 373 (1999) 19

Lambert v. State,
126 P.3d 646 (Okla. Crim. App. 2005) 28

Limbach v. Hooven & Allison Co.,
466 U.S. 353 (1984) 15

Lockett v. Ohio,
438 U.S. 586 (1978) 29

Moore v. Quarterman,
No. Civ. A. 603 CV 224, 2005 WL 1606437
(E.D. Tex. July 1, 2005), *vacated on procedural grounds*, 454 F.3d 484 (5th Cir. 2006) 19

Penry v. Johnson,
532 U.S. 782 (2001) 30

Penry v. Lynaugh,
492 U.S. 302 (1989) 3

Penry v. State,
178 S.W.3d 782 (Tex. Crim. App. 2005) 18

Pruitt v. State,
834 N.E.2d 90 (Ind. 2005) 16, 18

Rivera v. Dretke,
No. Civ. B-03-159, 2006 WL 870927 (S.D. Tex. Mar. 31, 2006) 19

Romano v. Oklahoma,
512 U.S. 1 (1994) 20

Smith v. Texas,
127 S. Ct. 1686 (2007) 30

Smith v. Texas,
543 U.S. 37 (2004) 30

State v. Jimenez,
908 A.2d 181 (N.J. 2006) 16

State v. Lott,
779 N.E.2d 1011 (Ohio 2002) 16

Tennard v. Dretke,
542 U.S. 274 (2004) 28, 30

United States v. Cisneros,
385 F. Supp. 2d 567 (E.D. Va. 2005) 17

United States v. Nelson,
419 F. Supp. 2d 891 (E.D. La. 2006) 17, 27

Wiley v. State,
890 So. 2d 892 (Miss 2004) 16

Constitutional Provisions and Statutes

U.S. CONST. amend. VIII ..... *passim*

U.S. CONST. amend. XIV ..... *passim*

28 U.S.C. § 1257(a) 1

ARIZ. REV. STAT. § 13-703.02(K)(1) (2007) 17

CONN. GEN. STAT. § 1-1(g)(b) (2007) 17

11 DEL. CODE § 4209(d)(3)d.1 (2007) 16

FLA. STAT. ANN. § 921.137(1) (2007) 17

IDAHO CODE ANN. § 19-2515A(1)(a) (2007) 16

725 ILL. COMP. STAT. 5/114-15(d) (2007) 16

KAN. STAT. ANN. § 76-12b01(a) (2006) 17

LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1) (2006) 17

MO. ANN. STAT. § 565.030(6) (2007) 16

N.C. GEN. STAT. ANN. § 15A-2005(a)(1)(b) (2007) 16

TENN. CODE ANN. § 33-1-101(17) (2003) 17

TEXAS HEALTH AND SAFETY CODE § 591.003(13) (2007) 5

TEXAS HEALTH AND SAFETY CODE § 593.005(a) (2007) 23

UTAH CODE ANN. § 77-15a-102 (2006) 17

VA. CODE ANN. § 19.2-264.3:1.1(A)(ii) (2006) 16

WASH. REV. CODE ANN. § 10.95.030(2)(d) (2007) 17

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AMERICAN ASSOCIATION ON MENTAL RETARDATION: MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (10th ed. 2002) ..... *passim*

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(R.W. Conley et al. eds. 1992) 27

James W. Ellis & Ruth A. Luckasson: *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV.
414 (1985) 24, 27

M.L. WEHMEYER ET AL., TEACHING STUDENTS WITH MENTAL RETARDATION: PROVIDING ACCESS TO THE GENERAL EDUCATION CURRICULUM (2002) 24

M.L. Wehmeyer & S.B. Palmer, *Adult Outcomes for Students with Cognitive Disabilities Three Years After High School: The Impact of Self-Determination*, EDUCATION AND TRAINING IN DEVELOPMENTAL DISABILITIES (2003) 24

Petitioner Elroy Chester asks that this Court issue a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals ("TCCA") is an unpublished decision; it is available at 2007 WL 602607 and is attached as Appendix A. The opinion of the trial court is unreported and is attached as Appendix B.

JURISDICTION

The final judgment of the TCCA was entered on February 28, 2007. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that "cruel and unusual punishments [shall not be] inflicted." The Fourteenth Amendment provides in relevant part that no state may "deprive any person of life . . . without due process of law."

STATEMENT OF THE CASE

A. Introduction

This case raises important questions arising from Texas's evasion of the constitutional prohibition on executing defendants who suffer mental retardation. In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the Eighth Amendment prohibits a state from taking the life of a mentally retarded offender because mentally retarded individuals are not among the most blameworthy who deserve the most serious possible sanction, no matter how

horrific their crimes. Texas has nullified *Atkins* by defining mental retardation in such a way that the exemption from death that this Court mandated for the mentally retarded is unavailable to nearly everyone who can conceive and carry out a capital crime.

While the *Atkins* Court permitted states to adopt their own procedures for determining whether someone suffers mental retardation, this deference to the states did not authorize Texas to adopt a standard that permits the execution of mentally retarded offenders. To the contrary, this Court charged the states with "the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." *Id.* at 317 (internal quotes and punctuation omitted; emphasis added).

Elroy Chester demonstrated in the Texas state courts that he has mental retardation. His IQ is below 70. His adaptive functioning is significantly subaverage as measured by every accepted standard. The Texas Department of Criminal Justice admitted him to its Mentally Retarded Offenders Program when he was incarcerated for prior offenses at ages 18 and 20. Yet, for the purpose of determining his eligibility for the death penalty, the TCCA declared him "not mentally retarded" because he did not "pass" a seven-factor test that the TCCA created and applies in capital cases instead of the accepted criteria for evaluating adaptive functioning.

This Court should grant review to enforce *Atkins* and to provide directions to Texas to prevent the execution of mentally retarded offenders.

B. Chester's Trial And Events Preceding The *Atkins* Hearing

Elroy Chester was charged by Texas with capital murder in February 1998. [Clerk's Record ("CR") 2-3] Six months later, he pled guilty, and a jury assessed his punishment. [CR 4; App. A at 1] At the penalty phase trial,

school records, multiple IQ test scores from Chester's childhood, records from Texas's Mentally Retarded Offenders Program, and expert testimony were all presented to show that Chester has mental retardation. [Penalty RR 20:98-99, 21:14-23][1]

The prosecutor did not vigorously dispute that Chester is retarded. He argued that Chester's mental retardation could be considered an aggravating factor, rather than a factor that would warrant imposing a non-death sentence. Chester's attorney objected, but the objection was overruled. [Penalty RR 21:36-37][2] The jury imposed a death sentence. [Penalty RR 21:50-51]

Chester appealed his sentence. The TCCA denied the appeal.[3] Chester also filed a state habeas corpus proceeding, asserting (among other grounds) that he is mentally retarded and his execution would violate the Eighth Amendment to the Constitution. His first state habeas application was denied.[4] Chester timely filed a federal habeas petition, again raising the claim that he suffers mental retardation and his execution would violate the Eighth Amendment. The

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1 Cites in the form "Penalty RR V:pp" refer to the Reporter's Record from Chester's penalty phase trial by Volume (V) and page numbers (pp). The evidence presented at the penalty phase is summarized in defense counsel's closing argument at Penalty RR 21:14-23. For the full defense evidence related to Chester's mental retardation, *see* Penalty RR 20:54-152, 26:Exhibits 29-42.

2 The argument is clearly improper in light of *Atkins*. It also illustrates how evidence of mental retardation was used, pre-*Atkins*, to enhance the likelihood a death penalty would be imposed. *See Atkins*, 536 U.S. at 321 (noting that "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury," citing *Penry v. Lynaugh*, 492 U.S. 302, 323-25 (1989)).

3 *Chester v. State*, No. 73,193 (Tex. Crim. App. unpublished decision delivered Jan. 26, 2000).

4 *Ex Parte Chester*, No. WR-45,249-01 (Tex. Crim. App. unpublished decision delivered May 31, 2000).

federal habeas application was *unresolved when Atkins was* issued. The Fifth Circuit dismissed Chester's federal case, without prejudice, to permit him to present his *Atkins* claim to the state courts.[5]

Following proper Texas procedures, Chester applied to the TCCA for leave to file a successive state habeas application. Based on the evidence that was presented in the penalty phase trial, the TCCA determined that Chester stated a prima facie case that he suffers mental retardation, and authorized the successive state habeas application.[6]

C. The *Atkins* Hearing

At the hearing conducted by the trial court, Chester again presented the evidence from the penalty phase trial, as well as substantial additional evidence.[7] He showed his long history of sub-70 IQ scores and evidence of significantly subaverage adaptive functioning. Again, Texas did not dispute much of the evidence, only the conclusion that Chester is mentally retarded.

Texas based its argument primarily on the so-called *Briseño* factors. *Ex Parte Briseño*, 135 S.W.3d 1 (Tex. Crim. App. 2004), is Texas's leading case on mental retardation post-*Atkins*. In *Briseño*, the TCCA announced that, until the Texas legislature adopts a definition of mental retardation, Texas courts "will follow the AAMR [AMERICAN

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5 *Chester v. Cockrell*, 62 F. App'x 556 (5th Cir. 2003) (not selected for publication in the Federal Reporter).

6 *Ex Parte Chester*, No. WR-45,249-02 (Tex. Crim. App. unpublished decision delivered Sept. 10, 2003).

7 *See* Reporter's Record ("RR") from the *Atkins* hearing 2:20-133, 3:5-50, 199-221 (expert witness Dr. David Ott), 3:242-80 (Chester's sisters), 4:6-68, 101-10 (Dr. Henry Orloff, former director of the Mentally Retarded Offenders Program), 117-68 (Elizabeth Segler, Chester's high school special education teacher), 6:Trial Ex. 3 (prison records), 7:Trial Ex. 42 (school records), 8:Ex. 2 (prison education records).

ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (9th ed. 1992)] or section 591.003(13) [of the Texas Health and Safety Code] criteria in addressing *Atkins* mental retardation claims." 135 S.W.3d at 8.

The AAMR and the Texas statute begin with the well-established clinical definition that mental retardation has three basic elements: (1) significantly subaverage intellectual functioning, (2) significantly subaverage adaptive functioning, and (3) onset before age 18.[8] These accepted definitions of mental retardation provide criteria for what it means to have significantly subaverage adaptive functioning.[9] However, the *Briseño* court ignored those criteria and enunciated seven other factors that Texas courts may consider in assessing adaptive functioning. 135 S.W.3d at 8-9.[10]

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[8] *See Briseño*, 135 S.W.3d at 7; AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 1 (10th ed. 2002) [hereafter "AAMR 10th ed."]; *id.* at 22 (restating AAMR 9th ed. criteria); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 49 (4th ed. Text Revision 2000) [hereafter "DSM-IV-TR"]. *Atkins* cited and relied on the AAMR Ninth Edition and the DSM-IV-TR. *See Atkins*, 536 U.S. at 308 n.3.

[9] *See* AAMR 10th ed. at 23, 42, 74, 78 (dividing adaptive functioning into three major domains, listing representative skills within those domains, and defining "significantly subaverage adaptive functioning" as having an overall score two standard deviations below the mean on a standardized test assessing all domains or having significant deficits in any one area); *id.* at 22 (reprinting AAMR 9th ed. definition which lists ten adaptive skill areas and defines "significantly subaverage adaptive functioning" as having significant deficits in any two of those areas); DSM-IV-TR at 49 (following AAMR 9th ed.).

[10] The factors are "[1] Did those who knew the person best during the developmental stage – his family, friends, teachers, employers, authorities – think he was mentally retarded at that time, and, if so, act in accordance with that determination? [2] Has the person formulated plans and carried them through or is his conduct impulsive? [3] Does his conduct show leadership or does it show that he is led around by others? [4] Is his conduct in response to external stimuli rational and appropriate,

At the *Atkins* hearing, Chester proved that he tested repeatedly in the mentally retarded range on standardized IQ tests.[11] His full-scale IQ scores were:

Age	7	12	13	18	29
IQ	69	59	77	69	66

[RR 2:95-104, 6:Trial Ex. 3-229, 7:Trial Ex. 42-064, -190-91] Testimony explained why the one score over 70 is highly unreliable. [RR 2:109-17, 4:241-43] Since the first four tests were administered when Chester was 18 years or younger, there was no dispute that Chester's subaverage intellectual functioning had its onset before he was 18. The trial court rejected the substantial evidence of Chester's below-70 IQ and found that Chester had not shown he suffers significantly subaverage intellectual functioning. [App. B at 7-10] The TCCA later determined that this finding is not supported by the evidence in the record and held that Chester carried the burden of proving that he suffers significantly subaverage intellectual functioning, with an onset before age 18. [App. A at 8]

With respect to the requirement of significantly subaverage adaptive functioning, Chester presented evidence about his developmental years. Texas placed him in special education classes from second grade onward. His younger sister helped him with basic skills. Even as an adult, he never lived independently, but always lived with family who took care of him. He could not fill out a job

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regardless of whether it is socially acceptable? [5] Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject? [6] Can the person hide facts or lie effectively in his own or others' interests? [7] Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?" *Briseño*, 135 S.W.3d at 8-9.

[11] Texas generally accepts 70 as the cut-off point for determining whether someone should be classified as mentally retarded. *See Briseño*, 135 S.W.3d at 14 & n.54.

application. He never had a bank account or a driver's license. He never shopped or cooked for himself on a regular basis. [RR 3:268-78, 6:Trial Ex. 3-227-28, -231-32, 7:Trial Ex. 42-026, -036] Unquestionably, he never attained the adaptive functioning levels of an average adult.

When he was first incarcerated at age 18, and again at 20, the Texas prison system placed him in its Mentally Retarded Offenders Program. As part of the intake process, the Texas Department of Criminal Justice ("TDCJ") documented his poor adaptive functioning through observations, clinical interviews, and standardized testing. Chester scored 57 on a Vineland Adaptive Behavior Scales test, and 69 on a standard IQ test.[12] [RR 4:26-31, 51-53, 6:Trial Ex. 3-229; App. A at 9] No evidence impugned the validity of either test. [RR 3:20-22, 5:49-50] Under the guidelines of the AAMR, an overall score two standard deviations below the mean on a test such as the Vineland establishes that the individual has significantly subaverage adaptive functioning.[13] Texas's expert witness acknowledged that the proper diagnosis for a person who at the age of 18 had a full-scale IQ score of 69 and a contemporaneous Vineland score of 57 is "mentally retarded." [RR 5:83-84] Texas's expert also agreed that Chester had "pretty poor adaptive functioning" when he entered prison at age 18, with no significant improvement when he returned to prison at age 20. [RR 5:32]

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12 The Vineland test is scored in the same manner as an IQ test, where 100 is the mean, and 70 is two standard deviations below the norm. A score of 57 on a Vineland test is a significantly subaverage score and indicates that 99.8% of all people have a higher level of adaptive functioning. [RR 3:20-22, 4:52-53, 5:50]

13 *See* RR 2:84-85, 3:20-22; AAMR 10th ed. at 74 ("A score of two standard deviations below the mean on a total score from an instrument that measures conceptual, practical, and social skills will . . . meet the operational definition of a significant limitation in adaptive behavior."); *id.* at 88 (the Vineland test has been shown to be a reliable and valid measure of mental retardation).

Besides proving his significantly subaverage Vineland score, Chester showed that he meets the criteria for classification as mentally retarded established by both the AAMR and the DSM-IV-TR. The AAMR Tenth Edition defines three domains of adaptive functioning and classifies a person as mentally retarded if he has significant deficits in one of those domains.[14] Undisputed testimony showed that Chester has significant deficits in at least two domains.

First, within the *conceptual* domain, Chester unquestionably has significant deficits in the representative skills involving language, reading, writing, and money concepts. [RR 3:7-14] His school and prison records reflect scores consistently at or below the third-grade level in reading and writing abilities. [RR 5:50-51] School records show significant oral communication difficulties as well, including the need to be in speech therapy for many years, for problems more profound than simple pronunciation errors. [RR 3:7-11, 13; RR 7:Trial Ex. 42-041-43, -062, -102, -111, -134, -143, -190, -311] School and prison records and the testimony of Chester's teacher establish his significant problems with arithmetic concepts, including understanding money. [RR 3:13-14, 4:127-30, 6:Trial Ex. 3-220, -230, 7:Trial Ex. 42-007, -066, -068]

Second, within the *practical* domain, the uncontroverted evidence showed Chester's significant deficits in the representative skill areas of occupational skills and abilities to engage in activities of daily living. In high school, Chester could not function in either of two off-campus vocational training programs, though in a sheltered

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[14] *See* RR 2:83; AAMR 10th ed. at 74 ("For a person with mental retardation, adaptive behavior limitations are generalized across domains of conceptual, social, and practical skills. Because subscale scores on adaptive behavior measures are moderately correlated, however, a generalized deficit is assumed to exist even if the score on only one dimension meets the operational criteria of being two or more standard deviations below the norm.").

setting, doing simple tasks in his own school's cafeteria, he was a good worker. [RR 3:18, 4:161-63, 7:Trial Ex. 42-136, -149] After high school, he held only menial jobs, and most of them for only a short time; he was not referred for formal vocational training because his teachers did not believe he could be trained safely. [RR 3:17-18, 4:131-32, 165, 6:Trial Ex. 3-227, -231] The TDCJ documented Chester's significant deficits in work skills, and placed him in a simple occupational skills training program. [RR 3:28, 6:Trial Ex. 3-215, -227, -231, -233] Chester's deficits respecting activities of daily living are apparent in his never living independently at any time in his life. He always stayed with people who cared for him; he never shopped or cooked for himself on a regular basis and was never responsible for paying bills. He could not have managed those responsibilities. He never had a bank account or a driver's license. [RR 3:16-17, 34-35, 256-58, 275-79, 6:Trial Ex. 3-227-28, -231-32]

The AAMR Ninth Edition and DSM-IV-TR classify a person as having significantly subaverage adaptive functioning if he has deficits in two of ten listed areas.[15] Chester proved his significant deficits in at least three areas: communication, functional academics, and work. [RR 3:24][16] Chester's deficits with respect to communication (including significantly subaverage abilities to read, write, and speak) are discussed above, as are his significant deficits with respect to work and occupational skills. Functional academic deficits were demonstrated through school records that reflect his placement in special education classes from

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15 The ten skill areas of the DSM-IV-TR are "communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." DSM-IV-TR at 49. The DSM-IV-TR criteria are based on the identical approach in the AAMR Ninth Edition. *See* AAMR 10th ed. at 114 (listing the AAMR 9th ed. criteria).

16 Chester has deficits in the areas of self-direction and community use as well. [RR 3:24-25]

elementary school onward. [RR 3:268-69, 4:145, 249, 7:Trial Ex. 42-009-11, -016, -026, -036, -089, -102, -134, -138, -143, -148, -153, -209][17] Chester graduated from high school last in his class, and he graduated only because, as a special education student, he was not required to pass particular classes or demonstrate particular proficiencies. [RR 3:179-82, 189-90, 4:127-28, 136-37, 143, 7:Trial Ex. 42-327-31, 8:Ex. 2-000995] Achievement testing by the TDCJ confirmed Chester's significant deficits in functional academics; though placed in remedial classes by the prison system, Chester made very little progress and at age 27 continued to read only at the second-grade level. [RR 8:Ex. 2-000992]

Chester's expert witness, Dr. David Ott, a psychologist with substantial experience working with the mentally retarded, addressed the AAMR and DSM-IV-TR factors systematically and articulated, consistent with the preceding discussion, why Chester manifests significantly subaverage adaptive functioning that requires classifying him as mentally retarded using any of the recognized criteria. [RR 2:22-27, 83-85, 3:6-28] The objective testing (i.e., the 57 score on the Vineland test) and the assessments by the TDCJ corroborated Dr. Ott's conclusion, based on reviewing records and interviewing Chester, that Chester's adaptive functioning is significantly subaverage.

For the most part, Texas did not contest the evidence that Chester presented, only the conclusion that he is mentally retarded. Texas presented testimony from an educational diagnostician who never worked with Chester. She stressed that Chester's school records sometimes show he was classified as "learning disabled," rather than mentally retarded. [RR 4:197, 219] However, a learning disability requires a significant discrepancy between the

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[17] Chester's failure to achieve academically was primarily a function of his intellectual deficits, not behavioral problems. School records reflect that generally he did not exhibit behavior problems. [RR 7:Trial Ex. 42-022, -031, -087, -103, -140, -150, -206]

individual's IQ scores and his scores on academic achievement tests. [DSM-IV-TR at 49; RR 2:40, 5:35] Chester's low IQ scores are consistent with his poor academic achievement scores. [RR 7:Trial Ex. 42-006, -007, -065-66, -137][18] Elizabeth Segler, a special education teacher who taught Chester throughout high school, explained that the Port Arthur Independent School District did not classify a child as mentally retarded so long as the child could be managed behaviorally within his home school's special education program, as Chester was. [RR 4:166-67] She regarded Chester as mentally retarded. [RR 4:168] Texas's expert witness agreed it was common for schools to label mentally retarded children "learning disabled," both to avoid the stigma of being retarded and to avoid the costs of special programs. [RR 5:34-35][19]

Texas's expert, psychiatrist Edward Gripon, conducted a classic forensic psychiatric interview with Chester, such as he would conduct to evaluate competency to stand trial; he did not consider the adaptive functioning criteria of the AAMR or DSM-IV-TR. [RR 5:15-16] He opined, based on his interview, that Chester is not mentally retarded, even though he agreed that the proper diagnosis for someone with an IQ score of 69 and contemporaneous Vineland score of 57, as Chester had at age 18, is "mental retardation." [RR 4:269-72, 5:83-84] He criticized neither test score and did not explain how, in light of the scores, he could declare that Chester does not have mental retardation.

Without referring to the *Briseño* factors by name, Dr. Gripon acknowledged that several are not diagnostic of

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[18] The diagnostician also acknowledged that the Texas Educational Association does not follow the DSM-IV-TR or AAMR definitions of mental retardation. [RR 4:223-25]

[19] *See also* AAMR 10th ed. at 31-32 (reporting on nationwide studies that show the tendency of schools to classify mentally retarded children as "learning disabled," rather than "mentally retarded" to avoid stigmatizing the children).

mental retardation. He testified that laypeople, and even experts, often fail to notice mental retardation, because mentally retarded individuals tend to cover up, or mask, their disabilities. [RR 5:17-20] He testified that mentally retarded individuals most often are rational and can carry on a coherent conversation. [RR 5:16-17] He testified that individuals with mental retardation can be deceptive, and that the ability to lie to avoid being caught is not inconsistent with having mental retardation. [RR 5:23, 25-26]

In attempting to refute the testimony that Chester presented, Texas emphasized the facts of Chester's crimes, using the *Briseño* factors that focus on the defendant's crime to argue that Chester must not be retarded because he had the ability to plan and carry out crimes. [RR 5:122-49, App. B at 10-24, 28-29 (prosecution's proposed findings of fact adopted by the trial court)]

The trial court signed the proposed findings of fact that Texas submitted.[20] These findings stated that Chester did not meet his burden of proving either that he had an IQ of less than 70 or that he had significantly subaverage adaptive functioning. [App. B at 10, 28-29] With respect to the latter determination, the findings focused exclusively on the *Briseño* factors and did not in any way apply the criteria of the DSM-IV-TR or AAMR. [App. B at 10-29]

Under Texas procedures, a trial court judge in a state habeas case functions as a master, whose findings constitute a "recommendation" that is submitted to the TCCA for its review. In his brief to the TCCA, Chester challenged the trial court's heavy reliance on the *Briseño* factors, and argued that using these factors to assess adaptive functioning permits the trial court to find erroneously that the defendant does not

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[20] Suggesting that the judge did not even carefully read what he signed, the judge initially signed findings submitted by the district attorney's office that were missing five pages from the middle. *See* Order signed July 23, 2004 (Crim. Dist. Ct. Jefferson Co.); *compare* Order signed July 26, 2004 (Crim. Dist. Ct. Jefferson Co.) [App. B].

suffer mental retardation, in violation of *Atkins* and the Eighth and Fourteenth Amendments.[21] Texas filed no brief defending the trial court's decision or the validity of the *Briseño* factors as a way to evaluate mental retardation.

D. Decision Of The Texas Court Of Criminal Appeals

The TCCA determined, first, that there was no dispute that evidence of mental retardation occurred and was recorded before Chester reached the age of 18. [App. A at 5] Second, the TCCA determined that Chester "met his burden in regard to demonstrating significant limitations in intellectual functioning." [App. A at 8] The TCCA called the trial court's contrary finding not supported by the record. [App. A at 6-8]

On the question of adaptive functioning, the TCCA accepted Chester's Vineland score of 57, and the testimony of Texas's expert witness that "a person with a Vineland score of 57, combined with an IQ of 69 as measured at the same time, would be correctly diagnosed as mildly mentally retarded." [App. A at 9] But the TCCA then deferred to the trial court's finding, based exclusively on the *Briseño* factors, that Chester did not demonstrate he has significantly subaverage adaptive functioning. [App. A at 9-19] Like the trial court, the TCCA focused exclusively on the *Briseño* factors and stressed Chester's criminal activity.[22] [App. A at

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21 *See Ex Parte Chester*, No. WR-45,249-02, Brief of Applicant/Appellant at 57-58, 68-76.

22 The TCCA took as true all that Chester allegedly said in his "confessions" – which unquestionably are statements written out by a police officer and signed by Chester. [Penalty RR 19:67, 146-48 (acknowledging that police officers wrote each "confession" in a manner to "make some sense of it")] The "confessions" give accounts of events in chronological and articulate terms very far removed from Chester's own method of speaking. *Compare* Penalty RR 20:4-52 (Chester's testimony) *with* Penalty RR 19:138-42 (a typical "confession"). The TCCA gave no apparent consideration to this Court's reminder that mentally retarded

9-19] The TCCA did not comment on the fact that the trial court did not analyze the AAMR or DSM-IV-TR factors, nor did the TCCA conduct its own analysis of how these factors apply to the evidence in the record. The TCCA did not address Chester's challenges to the *Briseño* factors and why they are not a valid way to assess mental retardation.

In short, Chester is subject to execution under the TCCA's ruling solely because he failed to "pass" the unscientific *Briseño* test that Texas uses to assess adaptive functioning.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

As described above, Chester showed at the *Atkins* hearing that he is mentally retarded under every recognized scientific definition. He presented expert testimony that discredited the *Briseño* factors as a valid way to determine mental retardation. In his post-hearing briefing to the trial court and the TCCA, Chester expressly challenged the reasonableness of the *Briseño* factors. He argued to the TCCA that reliance on this set of unscientific factors permits execution of the mentally retarded in violation of the Eighth Amendment. [Applicant's Proposed Findings of Fact and Conclusions of Law at 53-56; Brief of Applicant/Appellant at 57-58, 66-76]

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individuals are especially susceptible to confessing falsely to crimes they did not commit. *See, Atkins*, 536 U.S. at 320 & n.25. Chester never contested that he committed the crimes to which he confessed, but he did urge the trial court not to take at face value the descriptions of how he committed these crimes, since the "how" in the confessions reflects the police officers' abilities to organize the facts, not necessarily how Chester actually behaved. [Applicant's Proposed Findings of Fact and Conclusions of Law at 51-52] This difference becomes important when the "confessions" are used to find an ability to plan. *See* App. A at 16-17 (The "facts" of these crimes are based almost exclusively on the so-called "confessions.").

REASONS FOR GRANTING THE WRIT

I. TEXAS'S METHOD FOR ASSESSING MENTAL RETARDATION PERMITS THE EXECUTION OF MENTALLY RETARDED DEFENDANTS, IN VIOLATION OF *ATKINS* AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court is "concerned with federal issues and a contention that a state court disregarded a federal constitutional ruling of this Court." *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 362 (1984). In *Atkins*, this Court held that the Eighth Amendment categorically prohibits the execution of mentally retarded offenders who commit capital crimes. This Court acknowledged what Texas will not: Mentally retarded people can conceive and carry out capital offenses. 536 U.S. at 306-07. Through Texas's use of the *Briseño* factors, Texas evaluates mental retardation in a way designed to exclude from the protection of *Atkins* most Texas defendants, including Chester, who are mentally retarded. This Court should grant certiorari to enforce *Atkins* in Texas.

A. Nationally Accepted Definitions Of Mental Retardation Reflect The AAMR And DSM-IV-TR Criteria.

Atkins is based on a national consensus regarding those who suffer mental retardation. That consensus is built on a shared understanding of what mental retardation is, based on the widely accepted and well-established definitions developed by leading national mental health and disability organizations, such as the American Association on Mental Retardation and the American Psychiatric Association. This Court cited those definitions and the statutes of states that incorporate those definitions. 536 U.S. at 308 n.3, 314-17 & n.22. While this Court did not direct all

states to adopt those precise definitions, this Court clearly expected that all jurisdictions that impose a death penalty would adopt definitions that "generally conform" to the established definitions. 536 U.S. at 317 n.22. This Court thus foresaw little difficulty in the states' developing definitions of mental retardation consistent with the definitions around which the national consensus against executing the mentally retarded has formed, though there would be factual disputes over whether specific defendants met those definitions. *See id.* at 317 & n.22.

This Court was mostly correct. Five years after *Atkins,* most states with a death penalty have a definition of mental retardation, developed by the legislature or by case law, that the courts of those states employ when deciding whether a criminal defendant does or does not suffer mental retardation. All of those states adopt the three-part definition of the AAMR and the DSM-IV-TR.[23] Nine states specifically incorporate the skill areas of the AAMR Ninth Edition and the DSM-IV-TR as part of the definition of "significantly subaverage adaptive functioning"[24]; one uses the three domains of the AAMR Tenth Edition[25]; four others suggest that the AAMR and DSM-IV-TR skill areas provide useful guidance.[26] Seven states use other definitions entirely

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[23] Appendix C includes a table that provides the statutory and/or case law citations for the definition of mental retardation used in capital cases, and the definitions (if any) that states have developed for assessing "significantly subaverage adaptive functioning."

[24] *See* DEL. CODE tit. 11g § 4209(d)(3)d.1 (2007); IDAHO CODE ANN. § 19-2515A(1)(a) (2007); 725 ILL. COMP. STAT. 5/114-15(d) (2007); *Hughes v. State,* 892 So. 2d 203, 216 (Miss. 2004); *Wiley v. State,* 890 So. 2d 892, 895 (Miss. 2004); MO. ANN. STAT. § 565.030(6) (2007); N.C. GEN. STAT. ANN. § 15A-2005(a)(1)(b) (2007); *State v. Lott,* 779 N.E.2d 1011, 1014 (Ohio 2002); *Blonner v. State,* 127 P.3d 1135, 1139 (Okla. Crim. App. 2006); *Commonwealth v. Miller,* 888 A.2d 624, 630-31 (Pa. 2005).

[25] *See* VA. CODE ANN. § 19.2-264.3:1.1(A) (2006).

[26] *See In re Hawthorne,* 105 P.3d 552, 556-57 (Cal. 2005); *Pruitt v. State,* 834 N.E.2d 90, 108 (Ind. 2005); *State v. Jimenez,* 908 A.2d 181, 184 n.4 (N.J.

compatible with the AAMR and DSM-IV-TR criteria for establishing "significantly subaverage adaptive functioning."[27] Courts applying the federal death penalty statute also have developed standards for assessing adaptive functioning based on the AAMR and DSM-IV-TR criteria.[28] Texas alone follows a totally different course.

To be constitutional under *Atkins*, a state's definition of mental retardation "must encompass all defendants that 'fall within the range of mentally retarded offenders about whom there is a national consensus.'" *United States v. Cisneros*, 385 F. Supp. 2d 567, 570 (E.D. Va. 2005) (quoting *Atkins*, 536 U.S. at 308 n.3). The widespread use of the AAMR and DSM-IV-TR standards reflects that those definitions embody the national consensus concerning who suffers mental retardation.

The Indiana Supreme Court understood the significance of *Atkins* and the widespread use of the AAMR and DSM-IV-TR criteria:

> Although *Atkins* recognized the possibility of varying state standards of mental retardation, the grounding of the prohibition in the Federal Constitution implies that there must be at least a nationwide minimum. The Eighth

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2006); *Howell v. State*, 151 S.W.3d 450, 458 (Tenn. 2004) (quoting TENN. CODE ANN. § 33-1-101(17) (2003)).

[27] *See* ARIZ. REV. STAT. ANN. § 13-703.02(K)(1) (2007); CONN. GEN. STAT. § 1-1g(b) (2007); FLA. STAT. ANN. § 921.137(1) (2007); KAN. STAT. ANN. § 76-12b01(a) (2006); LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1) (2006); UTAH CODE ANN. § 77-15a-102 (2006); WASH. REV. CODE ANN. § 10.95.030(2)(d) (2007). Most of these definitions are drawn from the narrative section of the DSM-IV-TR entry on mental retardation. *See* DSM-IV-TR at 42 ("*Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected by someone in their particular age group, sociocultural background, and community setting.").

[28] *See, e.g., United States v. Nelson*, 419 F. Supp. 2d 891, 894-95 (E.D. La. 2006); *United States v. Cisneros*, 385 F. Supp. 2d 567, 570 (E.D. Va. 2005).

> Amendment must have the same content in all United States jurisdictions. Accordingly, we conclude that states are free to impose a higher standard, but the minimum definition of mental retardation sufficient to meet the national consensus found in *Atkins* must be uniform. . . . [I]f a state's definition of mental retardation were completely at odds with definitions accepted by those with expertise in the field the definition would not satisfy the prohibition.

Pruitt v. State, 834 N.E.2d 90, 108 (Ind. 2005).

B. Texas Alone Uses A Definition Of Mental Retardation That Disregards The Scientific Criteria For Measuring Adaptive Functioning.

Rather than evaluate "significantly subaverage adaptive functioning" using the accepted standards of the AAMR and DSM-IV-TR, Texas made up its own standards. The TCCA purported to adopt the *Briseño* factors as auxiliary to the AAMR Ninth Edition definition, but the court's analysis in Chester's case -- and in others -- shows that the *Briseño* factors often impermissibly supplant the AAMR and DSM-IV-TR criteria. Appendix D lists most of the post-*Atkins* decisions by the TCCA analyzing whether an individual convicted of capital murder subsequently proved he suffers mental retardation. Most opinions contain no analysis, making it impossible to know what standard for assessing adaptive functioning was used.[29] The TCCA has

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[29] A few cases that disclose the standards used contain no reference at all to the *Briseño* factors. *See, e.g., Ex Parte Blue*, __ S.W.3d __, 2007 WL 676194 at *8-9 (Tex. Crim. App. 2007); *Perry v. State*, 178 S.W.3d 782, 785, 790 (Tex. Crim. App. 2005) (noting, with apparent approval jury instructions that followed the AAMR Ninth Edition and DSM-IV-TR criteria rather than the *Briseño* factors). By making reliance on the *Briseño* factors optional, Texas violates a central tenet of this Court's death penalty

found that only seven defendants have mental retardation. Reportedly, in six of those cases, the prosecution conceded the mental retardation finding.[30] In other words, in only one case has a Texas court applying the *Briseño* factors found mental retardation following a contested hearing.[31] This track record manifests that Texas plainly intends to continue to execute people who commit heinous crimes, even when they suffer mental retardation.[32]

Any method for evaluating mental retardation that systematically allows the execution of mentally retarded offenders is unconstitutional. In ignoring the national consensus defining mental retardation, Texas makes a mockery of *Atkins* and violates the Eighth Amendment.

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jurisprudence: In order to be constitutional, the death penalty may not be imposed through sentencing procedures that create a substantial risk that death will be inflicted in an arbitrary or capricious manner. *See, e.g., Jones v. United States*, 527 U.S. 373, 381 (1999) ("the Eighth Amendment requires that a sentence of death not be imposed arbitrarily"); *Romano v. Oklahoma*, 512 U.S. 1, 7 (1994) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (states must "minimize the risk of wholly arbitrary and capricious action").

30 The state's agreement that the defendant suffers mental retardation is explicit in *Ex Parte Modden*, 147 S.W.3d 293, 295 (Tex. Crim. App. 2004), and *Ex Parte Stevenson*, No. AP-75,639, 2007 WL 841127 at *1 (Tex. Crim. App. unpublished decision delivered Mar. 21, 2007).

31 The single exception is *Ex Parte Bell*, 152 S.W.3d 103 (Tex. Crim. App. 2004).

32 At least twice, after the TCCA did not find sufficient evidence even to state a prima facie case of mental retardation, a federal district court subsequently found that the preponderance of the evidence proves that the defendant suffers mental retardation. *See Rivera v. Dretke*, No. Civ. B-03-159, 2006 WL 870927 (S.D. Tex. Mar. 31, 2006); *Moore v. Quarterman*, No. Civ. A 603 CV 224, 2005 WL 1606437 (E.D. Tex. July 1, 2005), *vacated on procedural grounds*, 454 F.3d 484 (5th Cir. 2006). Neither district court accepted the *Briseño* factors as a valid way to assess adaptive functioning. *See Rivera*, 2006 WL 870927 at *26; *Moore*, 2005 WL 1606437 at *5 & n.6.

C. Using The *Briseño* Factors To Assess Mental Retardation Violates The Eighth Amendment, Because The *Briseño* Factors Do Not Reliably Determine Mental Retardation.

"States must properly establish a threshold below which the [death] penalty cannot be imposed. . . . To ensure that this threshold is met, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold." *Romano v. Oklahoma*, 512 U.S. 1, 7 (1994) (internal quotation marks and citations omitted; emphasis added). Undisputed testimony establishes that the answers to at least six of the seven *Briseño* questions have little, if any, rational connection to whether someone is mentally retarded. An individual may have the "wrong" answer with respect to any or all of the *Briseño* factors and still be mentally retarded under every recognized definition. Reliance on the *Briseño* factors as a basis for deciding whether someone will live or die violates the Eighth Amendment.

1. Texas improperly excludes individuals with an antisocial personality from its definition of mental retardation.

Texas's method for determining mental retardation begins with a false dichotomy. The TCCA described the seven *Briseño* factors initially as a way to determine if someone has mental retardation or an antisocial personality disorder. 135 S.W.3d at 8. No scientific understanding of mental retardation supports drawing this distinction. Mental health professionals recognize that someone can have both mental retardation and an antisocial personality

disorder.[33] Indeed, antisocial conduct may evidence lack of adaptation to community living. *See Holladay v. Campbell*, 463 F. Supp. 2d 1324, 1345 (N.D. Ala. 2006).

Finding that someone is not mentally retarded because he manifests an antisocial personality makes virtually an empty set of *Atkins*'s categorical exclusion of the mentally retarded from those most blameworthy individuals eligible for the death penalty. Most people convicted of capital murder could be diagnosed as having an antisocial personality. *Atkins* held that, if those people are mentally retarded, they may not be executed. The *Atkins* dissenters protested that the majority opinion would exempt people, such as Atkins, who committed heinous crimes. *See Atkins*, 536 U.S. at 350-51 (Scalia, J., dissenting) (suggesting that the majority opinion requires no consideration at all of the depravity of the crime). The dissenting Justices understood that the majority opinion requires that some individuals who commit very horrible crimes will avoid being executed because they have mental retardation, which reduces their individual culpability, reduces the effectiveness of any sanction as a deterrent, and increases the likelihood that death will be imposed in spite of factors that call for a less severe sanction. *See id.* at 350-52 (discussing *id.* at 320-21). By excluding capital defendants with antisocial personalities from the group of defendants who may not be executed because they are mentally retarded, Texas flouts the key premise of *Atkins* and denies defendants such as Chester their rights under the Eighth Amendment.

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[33] *See* AAMR 10th ed. at 172 ("In general, mental health disorders are much more prevalent in this population [of individuals with mental retardation] compared to the general population. . . . The types of mental health disorders are the same in people with and people without mental retardation."); DSM-IV-TR at 45 ("Individuals with Mental Retardation have a prevalence of comorbid mental disorders that is estimated to be three to four times greater than the general population. . . . All types of mental disorders may be seen."); RR 2:41-42 (an individual can be both mentally retarded and mentally ill).

2. Texas improperly evaluates adaptive functioning through factors with no reliable relationship to mental retardation.

Even if the *Briseño* factors were not designed erroneously to "distinguish" defendants with mental retardation from defendants with antisocial personality disorders and were employed merely as a way to evaluate adaptive functioning, they are invalid and violate defendants' rights under the Eighth Amendment, because these factors are almost entirely unrelated to any valid definition of mental retardation. The *Briseño* opinion does not explain the derivation of the factors, but the opinion suggests that the list was developed by Texas judges without benefit of relevant scientific expertise. Thoughtful testimony from the experts in this case, corroborated by the scientific literature, establishes that the *Briseño* factors, separately and combined, have negligible relevance to the diagnosis of mental retardation, because a factfinder could find the "wrong" answers to most of the questions even when the applicant in fact suffers mental retardation.

"In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). Only highly unreliable factfinding is possible when courts analyze mental retardation using the *Briseño* factors.

First question: "Did those who knew the person best during the developmental stage . . . think he was mentally retarded at that time, and, if so, act in accordance with that determination?" Answering "no" to this question does not indicate that the person is not mentally retarded, because the question ignores the uncontested fact that mental retardation cannot reliably be diagnosed by laypeople, in part because mentally retarded people often cover up their deficits. [RR 2:63, 86-88, 5:17-20] As the experts in Chester's case testified, the full extent of a mentally retarded person's deficits often

are not apparent to the people around him. [RR 2:62-63, 86-88, 5:17-20] Texas's expert acknowledged that mental retardation can go unnoticed by people who are not trained regarding what to look for; that is why typically experts, not laypeople, must make a diagnosis of mental retardation. [RR 5:17] In the social services context, Texas requires that a diagnosis of mental retardation be supported by expert opinion. *See* Texas Health & Safety Code § 593.005(a) (2007) ("A physician or psychologist licensed to practice in this state or certified by the department shall perform the determination of mental retardation."). Where life or death in a criminal case turns on a determination of mental retardation, Texas may not be permitted to rely on lay opinions that are less reliable than the diagnoses Texas demands before providing social services to its mentally retarded citizens. The Eighth Amendment imposes a "heightened need for reliability in the determination that death is the appropriate punishment in a specific case." *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (internal quotes omitted). Because it is of little significance that people who knew the defendant during his developmental stage did not recognize that he was mentally retarded, a negative answer to *Briseño*'s first question does not indicate that the person is not mentally retarded.[34]

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[34] On the other hand, because of the great capacity of some people to cover up their retardation, it is significant when, despite an individual's efforts to mask retardation, others recognize him as mentally retarded and treat him that way. In Chester's case, family, teachers, and the Texas Department of Criminal Justice recognized him during his developmental period as different and slower than other children, and some formally labeled him mentally retarded. *See, e.g.*, RR 3:268-69; 4:249; 7:Trial Ex. 42–026, -036 (Chester was in special education classes from elementary school onward), RR 3:270-79 (his younger sister had to help him with school work, house chores, and shopping), RR 4:168, 7:Trial Ex. 42-312 (his school district's educational diagnostician labeled him mentally retarded in elementary school, and his high school special education teacher considered him to be mentally retarded), RR 4:31; 6:Trial Ex. 3-229, -233

Second question: "Has the person formulated plans and carried them through or is his conduct impulsive?" According to both the defense expert and Texas's expert, mentally retarded people can perform many activities that require formulating and carrying out plans. [RR 2:63-65, 5:23-26] The DSM-IV-TR states that mentally retarded individuals with an IQ in the range of 55-70 "usually achieve social and vocational skills adequate for minimum self-support" and "can usually live successfully in the community." DSM-IV-TR at 43. Those skills plainly require planning and not purely impulsive behavior.[35] A sizeable body of research shows that mentally retarded individuals can learn to set goals and make and carry out plans.[36] Furthermore, as shown by the TCCA's analysis in Chester's case [App. A at 11-19], the *Briseño* question invites an intense focus on a single act -- such as whether the defendant's crime appeared impulsive or reflected some planning -- and that

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(the TDCJ placed him in the prison's Mentally Retarded Offenders Program).

[35] *See also* Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 423, 474-75 & nn. 340, 342 (1985) (noting that most mentally retarded individuals fall in the range of "mildly mentally retarded" – i.e., with an IQ in the range of 55-70 – and a disproportionate number of those who become criminal defendants are in this range because the more profoundly retarded are often institutionalized and, if they commit crimes, are likely to be found incompetent); RR 2:61 (similar testimony). The mildly mentally retarded undeniably possess some ability to plan. In citing the clinical definitions of mental retardation as a category, as distinct from the subclassification for "severe mental retardation," the *Atkins* Court plainly did not intend to exclude approximately 85% of all mentally retarded individuals from the scope of its protections.

[36] *See, e.g.*, M.L. WEHMEYER ET AL., TEACHING STUDENTS WITH MENTAL RETARDATION: PROVIDING ACCESS TO THE GENERAL EDUCATION CURRICULUM (2002); M.L. Wehmeyer & S.B. Palmer, *Adult Outcomes for Students with Cognitive Disabilities Three Years After High School: The Impact of Self-Determination*, EDUCATION AND TRAINING IN DEVELOPMENTAL DISABILITIES (2003).

mistakes the point of an adaptive functioning assessment. The AAMR Tenth Edition at 17 states: "Adaptive behavior encompasses the application of conceptual, social, and practical skills to daily life. Its assessment should relate to an individual's typical performance during daily routines and changing circumstances, not to maximum performance."[37] Thus, an affirmative answer to the second question does not indicate that the defendant is not mentally retarded, especially when the answer is based on review of the defendant's crime.[38]

Fourth question: "Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?" Again, a "yes" answer does not indicate that the person is not mentally retarded. As the former Director of the Texas Department of Criminal Justice's Mentally Retarded Offenders Program testified, "Irrationality is more characteristic of mentally ill, usually psychotic individuals than mentally retarded. Mentally retarded people are not considered irrational." [RR 4:62] Texas's expert concurred that most mentally retarded people are rational: "[I]f you saw a substantial degree of irrationality you would look for the presence of Axis I diagnostic entry or some kind of mental disorder or mental illness." [RR 5:16] Consequently, the absence of tendencies to be irrational and inappropriate does not signal an absence of mental retardation.

Fifth question: "Does he respond coherently, rationally, and on point to oral or written questions, or do his responses wander from subject to subject?" Testimony by experts for both sides establishes that answering this

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37 *Accord* AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, USER'S GUIDE: MENTAL RETARDATION DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORT - 10TH EDITION at 4 (2007) [hereafter "AAIDD"]. AAIDD is the new name for the former AAMR.

38 No testimony about the third question was presented.

question does not help determine whether a person has mental retardation. The former director of the Mentally Retarded Offenders Program testified that, if a person is able to respond coherently, it "[c]ertainly does not" mean he is not mentally retarded; to the contrary, most individuals with mental retardation are capable of communicating coherently. [RR 4:63] "Disorganized speech (e.g., frequent derailment or incoherence)" is a characteristic of schizophrenia and other psychotic disorders. DSM-IV-TR at 312, 332. Texas's expert observed that, whether a person can respond rationally, coherently, and on point to questioning, without wandering from subject to subject, is really a test of competency to stand trial. [RR 5:16-17] Mental illness and incompetency are very different from mental retardation. No recognized text on mental retardation includes inability to carry on a conversation as a diagnostic criterion. The DSM-IV-TR at 43 states that most people in the mild mental retardation range (IQ 55-70) "develop social and communication skills during the preschool years . . . and often are not distinguishable from children without Mental Retardation until a later age. . . . During their adult years, they usually achieve social and vocational skills adequate for minimal self-support . . . ." Therefore, an affirmative answer to the fifth question does not indicate that the defendant is not mentally retarded.

Sixth question: "Can the person hide facts or lie effectively in his own or others' interests?" The State's expert testified that mentally retarded people can put forth deceptive behaviors and lie about whether they have done something wrong. [RR 5:23, 25-26] Therefore, an affirmative answer to this sixth question does not indicate that the defendant is not mentally retarded.

Seventh question: "Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?" Like the second question, this question erroneously focuses on what may be the individual's maximum performance, not his typical

everyday adaptive functioning. The focus on criminal behavior contradicts the nation's foremost authority on mental retardation, which states bluntly: "Do not use criminal behavior or verbal behavior to infer level of adaptive behavior or about having [mental retardation]." AAIDD at 22. As the TCCA's analysis in Chester's case exemplifies, Texas uses this final question as a way to "rule out" mental retardation based on the fundamentally mistaken premise that any individual "smart enough" to commit a capital offense must not be "dumb enough" to be mentally retarded and therefore avoid execution. No professional, scientific definition of mental retardation supports this assumption. The professional literature in the field of mental retardation has recognized for many years that mentally retarded individuals can commit crimes.[39]

Courts outside of Texas recognize that focusing on the facts of the crime is not a constitutionally acceptable way to determine whether the defendant suffers mental retardation. In *United States v. Nelson*, 419 F. Supp. 2d 891, 902 (E.D. La. 2006), the court wrote that the defendant's "behavior in these isolated incidents has limited relevance to the mental retardation diagnosis because it is isolated, in contrast to the recurring patterns which emerge from all of the records in this case and which indicate a low level of adaptive functioning." Similarly, in *Holladay v. Campbell*, 463 F. Supp. 2d 1324, 1347 (N.D. Ala. 2006), the court observed that, when there is "little doubt that if [the defendant] and his history had been examined before the date of his subject offenses, a finding of mental retardation would have been made," that same finding must be made after the crime,

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[39] *See, e.g.*, THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS (R.W. Conley, et al. eds. 1992); Ellis & Luckasson, *supra* n.35. Texas recognized the capacity of mentally retarded offenders to commit crimes by creating the Mentally Retarded Offenders Program within the Texas Department of Criminal Justice; it hardly excluded individuals from that program because they had shown the capacity to plan and carry out crimes.

because a series of violent incidents does not mean the defendant is not mentally retarded.

The Oklahoma Court of Criminal Appeals, in *Lambert v. State*, 126 P.3d 646, 659 (Okla. Crim. App. 2005), also correctly recognized that emphasis on the facts of the crime, rather than systematic analysis of adaptive functioning under professionally recognized criteria, is not a constitutionally acceptable way to decide mental retardation. *Lambert* is like Chester's case in that the state did not contest mental retardation before *Atkins*; prosecutors argued that mental retardation could be an aggravating factor. Post-*Atkins*, when the state disputed the defendant's mental impairment, the state (as in Chester's case)

> largely failed to address [the defendant's] claims of deficits in adaptive functioning in specific areas over the years. Instead, the State relied almost exclusively on evidence of [the defendant's] past criminal activity, arguing that he was not mentally retarded but had chosen a life of crime. These choices do not suggest an attempt to comply with either the spirit or letter of the law prohibiting the execution of the mentally retarded.

Id. The Oklahoma appellate court vacated the trial court's determination that the defendant was not mentally retarded. In that decision, Oklahoma followed the spirit and letter of *Atkins*. Texas does not.

Texas's emphasis on the facts of the crime runs afoul not just of *Atkins* but also of *Tennard v. Dretke*, 542 U.S. 274 (2004). *Tennard* made clear that Texas may not require a criminal defendant, as a condition of avoiding execution, to show a nexus between any mitigating factor, including mental retardation, and the crime he committed. *Id.* at 287. Answering *Briseño*'s seventh question directs the trier of fact into the forbidden inquiry whether the defendant's mental retardation has a nexus with the crime; if the crime looks too sophisticated, the court will find no nexus, and Texas will

allow the defendant to be executed. Most of the TCCA's opinion in Chester's case focused on whether the court believed Chester's crimes could have been committed by a person with mental retardation. [App. A at 11-19]

3. Chester's case offers an excellent vehicle for enforcing *Atkins* in Texas.

Texas deemed Chester not mentally retarded solely because he failed the *Briseño* test. The trial judge believed the answers to the *Briseño* questions compelled him to find that Chester is not mentally retarded, without the need to analyze Chester's adaptive functioning using the AAMR or DSM-IV-TR criteria. [App. B at 9-29] The TCCA deferred to the trial court's finding, and reinforced it with its own analysis based exclusively on the *Briseño* factors. [App. A at 9-19] As shown above, by relying on the *Briseño* factors, Texas classifies as "not retarded" many people, such as Chester, who in fact suffer mental retardation.

When the choice is between life and death, a procedure that "'creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.'" *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1674-75 (2007) (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). *See also id.* at 1672 (reiterating that a constitutional defect occurs when the trier of fact "'ha[s] no reliable means of giving mitigating effect'" to the evidence the defendant proffers to spare his life (quoting *Graham v. Collins*, 506 U.S. 461, 475 (1993) (emphasis added)). Texas uses an unreliable method of determining mental retardation, and applied it to Chester.

Texas routinely applies this Court's Eighth Amendment decisions to give them as narrow an effect as possible, attempting to preserve its right to execute individuals that this Court has held the Constitution protects from the death penalty. This Court has had to instruct Texas

repeatedly to ensure its decisions are enforced.[40] Texas repeats this pattern by limiting *Atkins* so severely as to make its protections almost meaningless.

Many Texas defendants have wrongly been denied relief under *Atkins* because of Texas's reliance on its *Briseño* factors. Absent review by this Court, many more will be executed. Chester's case offers an ideal vehicle for instructing Texas to follow *Atkins* and exempt from execution all defendants who are mentally retarded, regardless of the nature of their crimes. Unlike other defendants who claim to be mentally retarded, Chester met his burden of proving his significantly subaverage intellectual functioning and its onset in the developmental period, and he proved his significantly subaverage adaptive functioning under all the recognized standards. He is subject to execution only because he "failed" Texas's unauthorized *Briseño* test.

CONCLUSION

This Court should grant certiorari to correct Texas's disregard of *Atkins* and to enforce the Eighth Amendment's prohibition against executing the mentally retarded.

Respectfully submitted,
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[40] *See, e.g., Brewer v. Quarterman*, 127 S. Ct. 1706 (2007); *Smith v. Texas*, 127 S. Ct. 1686 (2007); *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007); *Smith v. Texas*, 543 U.S. 37 (2004); *Tennard v. Dretke*, 542 U.S. 274 (2004); *Penry v. Johnson*, 532 U.S. 782 (2001).